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Privacy Considered and Jurisprudence Consolidated: *Ferdinand v MGN Ltd*

Introduction

The most recent privacy decision by the English courts, *Ferdinand v MGN Ltd*,¹ brings together a number of key themes which have been developing in recent years, including the role of anonymised court reports and, critically, the relevant facts in assessing the public interest when determining whether the right to privacy has been infringed. While hardly novel on its facts, there is nevertheless much of interest in this latest decision, which was handed down by Mr Justice Nicol.

Perhaps one of the most striking things about the decision is that it demonstrates how rich a jurisprudence has developed in England in the relatively short period since October 2000, when the Human Rights Act 1998 (“HRA”) came into force – and much of that dates from the landmark decision of *Campbell v MGN Ltd* in 2004. Whereas cases in the early days of the new order grappled with the difficulties of a need to respect privacy in a jurisdiction which had steadfastly refused to grant such a right (*Kaye v Robertson*² was still only nine years old when the HRA came into force), the current legal analysis can draw on a fairly clear and settled body of case law. This is certainly in evidence in *Ferdinand*, as Mr Justice Nicol cites over 12 significant English decisions from the last decade, featuring a range of celebrities, footballers and other public figures.³ Moreover, certain cases are now recognised as landmark cases which have shaped the approach to recognising article 8 privacy rights and balancing them against the article 10 right to freedom of expression. These cases comprise *Campbell v MGN*⁴; *McKennitt v Ash*⁵; *Murray v Express Newspapers*⁶; *Re S (A Child)*⁷; and *Mosley v News Group Newspapers*⁸.

From the European angle, the judgment in *von Hannover v Germany*⁹ remains supreme, setting out the fundamentals of recognising the privacy (and its limits) of famous individuals – be they royalty, politicians, or celebrities. The most recent addition to the European jurisprudence is *Mosley v UK*¹⁰, which was also cited in *Ferdinand*.

The facts of the case

One thing which English privacy cases typically share is that they involve celebrities and kiss and tell stories. Baroness Hale’s popular description of *Campbell v MGN* can be applied to many¹¹ of the parties that have featured in the litigation since then: “Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper.”¹² The present case is no different, with the Sunday Mirror publishing a

¹ [2011] EWHC 2454 (QB), of 29 September 2011.

² [1991] FSR 62.

³ Litigants have included Jamie Theakston, Garry Flitcroft, Fred Goodwin, John Terry, and Lord Browne of Madingley.

⁴ [2004] 2 AC 457.

⁵ [2008] QB 73 (CA).

⁶ [2007] EWHC 1908 (Ch) and on appeal [2008] EWCA Civ 446.

⁷ [2005] 1 AC 593.

⁸ [2008] EWHC 1777 (QB).

⁹ (2005) 40 EHRR 1.

¹⁰ App No 48009/08.

¹¹ With some notable exceptions, including *McKennitt v Ash* and *Murray v Express Newspapers*.

¹² [2004] 2 AC 457, para 143.

story on 25 April 2010 headed “My Affair with England Captain Rio”, the details of which were drawn from an interview with Ms Carly Storey, who had known Rio Ferdinand from 1997. Although the interview was based on Ms Storey’s position, the court was able to draw on plenty of evidence from Ferdinand himself, from a range of newspaper interviews he had given over the years, together with extracts from his own autobiography. These sought to paint a picture of a wild child who was now reformed, thanks to his family commitments to his wife and sons.

Ms Storey’s decision to go public in April 2010 with details of their 13-year on/off affair arose from Ferdinand’s promotion to captain the English football team in February that year – ironically appointed to replace John Terry, who has also occupied the time and attention of the courts on privacy matters after an exposé of his extra-marital affair with the former girlfriend of an England team mate.¹³ Following Terry’s fall from grace in January 2010, England manager Fabio Capello had sought to appoint a replacement who would act not only as a leader on the pitch but as a role model off the pitch: “I ask always that the captain is an example to the young, for the children, for the fans...a role model outside the game - in life as well.”¹⁴

At this point, Ms Storey sent a text message to Ferdinand which said: “Oh my you taking over jt what a joke, maybe its time I cashed in seen as you want 2 blank me.”¹⁵ Following a brief response from Ferdinand (“Wot chattin about”), Ms Storey sent a further text saying “Sorry I sent you that text the other day it was supposed 2 be a joke, I can see that it might of upset you and I didn’t mean 4 that, I hope al is good anyway. Remember always friends.”¹⁶

Despite these reassuring words, Ms Storey had made contact with Max Clifford by the end of the month, and her story appeared in the Sunday Mirror two months later. One point on which Ferdinand sought to rely in this action was that the Sunday Mirror had not notified him in advance of publication. Although this was contrary to common media practice in the UK, *Mosley v UK* enabled the European Court of Human Rights to clarify recently (albeit after the publication in the present case) that there is no legal obligation for a person to notify the party involved prior to publishing private information.¹⁷

Since Ferdinand was not notified prior to publication, and therefore had no opportunity to seek an injunction, the current action was a post-publication claim for infringement of his privacy. The action was raised against MGN Ltd, and Ms Storey was not a litigant: indeed, she did not even give evidence in court, choosing instead to go abroad shortly before the trial. Her witness statement was therefore available, but was not open to cross-examination.

In addressing the claim, the court reiterated the (now well-established) process by which privacy issues are approached. First, it must be ascertained if article 8 is engaged: is the information in question “private” such that it is protected by article 8?

¹³ *Terry (previously “LNS”) v Persons Unknown* [2010] EWHC 119 (QB).

¹⁴ [2011] EWHC 2454 (QB), para 11, said by Capello when announcing Ferdinand’s appointment and quoted in the Sunday Mirror article that formed the basis of this litigation.

¹⁵ [2011] EWHC 2454 (QB), para 24.

¹⁶ [2011] EWHC 2454 (QB), para 24.

¹⁷ *Mosley v UK* App No 48009/08.

If so, the court then needs to balance the privacy interest under article 8 with the right to freedom of expression under article 10, to determine whether the right to privacy must yield to expression.¹⁸

Was the information protected in principle by article 8?

There were three types of information in the Sunday Mirror's article, all of which should be protected by article 8 according to the Claimant. These were (i) text messages between Ferdinand and Ms Storey (and thus a form of correspondence); (ii) details of their sexual relationship; (iii) a photograph of Ferdinand and Ms Storey in a hotel room in 1997 (fully clothed and with others present). As *Campbell* and *Reklos* have recognised, photographs typically deserve special protection, in part because of the insight they can provide to feelings and actions at the time.¹⁹ Although Ferdinand's wife and children were not party to the litigation, there was also a claim that the article impinged on their right to privacy under the ECHR.

One of the critical factors in the defence was the fact that Ferdinand had already talked publicly about his bad behaviour, including driving bans, affairs with other women when he was in a relationship with Ms Ellison (whom he subsequently married), and in particular what was referred to as the "Ayia Napa incident", when Ferdinand had been filmed having sex with an unknown woman in Ayia Napa in 2000. These details had been raised by Ferdinand in interviews and in his autobiography (published in 2006). He had referred to his behaviour, including in Ayia Napa, and then explained "I admit I got carried away with it at times but you get older, more responsible and leave that sort of thing behind."²⁰

This public disclosure of certain improprieties was important to the defence for two reasons. First, it indicated that the information was in the public domain, and therefore Ferdinand could have no expectation of privacy in relation to it. Second, however, it illustrated his attempt to portray himself as a reformed character – as having moved on from his wild behaviour in his youth, to become a responsible family man. This was a theme which was repeated in interviews he gave with the News of the World and the Daily Telegraph (both in 2006), and in the Times and Observer (both in 2008).²¹

Despite these previous public references to his extra-marital affairs and other misbehaviour, Mr Justice Nicol concluded that the information disclosed did have the necessary quality to merit protection by article 8. The first limb of the test was therefore satisfied in relation to the material published. The text messages were accepted to be "correspondence" and therefore capable of protection.²² The photograph of both parties in a hotel room appeared to cause slightly more difficulty, since it showed "nothing remarkable", but again the court held that it was capable of being "private".²³

¹⁸ [2011] EWHC 2454 (QB), paras 38-42, with reference to *Von Hannover v Germany* (2005) 40 EHRR 1; *Campbell v MGN* [2004] 2 AC 457; *Re S (A Child)* [2005] 1 AC 593; and *McKennitt v Ash* [2008] QB 73 (CA).

¹⁹ *Campbell v MGN* [2004] 2 AC 457 and *Reklos v Greece* (App no 1234/05) (15 April 2009), [2009] EMLR 16.

²⁰ As quoted in the judgment, para 31.

²¹ Again, as reported in the judgment, paras 30-35.

²² [2011] EWHC 2454, para 55.

²³ [2011] EWHC 2454, para 54.

In relation to the information in the article regarding Ferdinand's relationship with Ms Storey from 1997-2010, this too was considered to be private. Although details about other affairs had been made public, Ferdinand's relationship with Ms Storey was not widely known, but rather was confined to their family and friends. In part, this was supported by the Sunday Mirror's own description of their article as an "exclusive".²⁴ In assessing the private nature of the information, Mr Justice Nicol observed that "[s]exual behaviour in private is part of the core aspects of individual autonomy which Article 8 is intended to protect."²⁵ While there may well be circumstances in which information about sexual activities is not protected, the circumstances will often be relevant at the second stage, in balancing privacy and expression, rather than at the prior stage of determining whether the information engaged article 8. Issues such as Ferdinand's role as captain of the England football team were considered to have no effect on this prior question. Previous indiscretions did not remove an expectation of privacy – and nor did the fact that Ferdinand had not litigated on previous newspaper articles constitute a waiver or personal bar in respect of the present litigation.²⁶

It is submitted that this is the correct approach to these points. Whether the Claimant has disclosed information about other conduct, or has previously chosen not to litigate, should not undermine the basic application of article 8. If information is fundamentally "private" in nature, then external factors should not alter that. However, these factors may well have significance when it comes to the balancing exercise, and assessing whether article 10 considerations outweigh the protection to be given to that private information.

The final submission, that the publication also infringed the privacy of Ferdinand's wife and children, was given less weight by the judge. This was primarily because there was no witness statement or evidence from Ms Ellison.²⁷ However, the judge also noted that Ferdinand's children were too young to fully understand, since they were aged three and one at the time of publication. This is a more complex issue, since a physical invasion of privacy could easily arise in respect of someone who is unable to comprehend the nature of the invasion (such as where a coma patient is abused).²⁸ It is therefore potentially troublesome to draw a line based on awareness of the infringement, and it should not always be necessary for the individual to understand or be aware of the infringement in order to suffer an invasion of privacy. However, it was not an issue which the court was required to tackle in this case.

The Balancing Exercise: Reconciling articles 8 and 10

Having established that the information was *prima facie* private, the second stage was to consider the balance to be struck between privacy and expression. The typical approach requires the court to treat each case on its own facts, placing "an intense

²⁴ [2011] EWHC 2454, para 52.

²⁵ [2011] EWHC 2454, para 56.

²⁶ [2011] EWHC 2454, paras 58-59.

²⁷ The significance of failing to bring evidence was also considered in *Terry (previously "LNS") v Persons Unknown* [2010] EWHC 119 (QB).

²⁸ Civilian European jurisprudence deals with the subjective nature of certain personality rights and the difference between absolute and relative rights. See for example Huw Beverley-Smith, Ansgar Ohly and Agnes Lucas-Schloetter, *Privacy, Property and Personality* (CUP, 2005).

focus on the comparative importance of the specific rights being claimed in the individual case.”²⁹

In focusing on the facts in question, two general principles were outlined by Mr Justice Nicol at the start of this exercise. The first was that the public interest is critical, but any disclosure must make a genuine contribution to the public debate, and not just be of interest to the public: “the contribution which the publication makes to a debate of general interest is the decisive factor in deciding where the balance falls between Article 8 and Article 10.”³⁰ Lurid tittle-tattle will not attract the “robust” protection of article 10.³¹

The second proposition was that the public interest is not confined to the exposure of conduct which is illegal.³² Thus, the public interest can be served by disclosure of information which reveals behaviour which is contrary to the individual’s public portrayal of himself, for example, even if it is not of itself criminal.

While this is certainly a useful point, the opposite is not automatically true: simply because the act in question *is* illegal will not automatically render invasion or disclosure in the public interest, and therefore protected by article 10. This was explored by Mr Justice Eady in *Mosley v News Group Newspapers Ltd*, where he considered:

Would it justify installing a camera in someone’s home, for example, in order to catch him or her smoking a spliff? Surely not. There must be some limits and, even in more serious cases, any such intrusion should be no more than is proportionate.³³

In fact, it has been recognised that even if disclosure of private information *per se* can be justified in the public interest, publication in the media may be unjustified. It may often be more appropriate to disclose criminal conduct to the appropriate authority, such as the police, and serve the public interest in that way – rather than seeking to serve the interests of the public by publishing in a tabloid.³⁴

When assessing whether there is a public interest in the disclosure, one relevant aspect of this can be “correcting a false image”.³⁵ Thus, as with *Campbell*, the Mirror claimed in its defence that, even if the information was private, it was in the public interest to expose Ferdinand’s hypocrisy and to set the record straight. This requires the information to be disclosed to be true, since it must be accurate in correcting an

²⁹ *Re S (A Child)* [2005] 1 AC 593, para 17.

³⁰ [2011] EWHC 2454, para 62.

³¹ With reference to *Mosley v UK* App No. 48009/08, and *Von Hannover v Germany* (2005) 40 EHRR 1.

³² [2011] EWHC 2454, para 63, with reference to *Terry (previously “LNS”) v Persons Unknown* [2010] EWHC 119 (QB).

³³ *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777, para 112.

³⁴ Although note Ouseley J’s comment in *Theakston v MGN Ltd* [2002] EWHC 137 (QB) ([69]) that the ‘free press is not confined to the role of a confidential police force; it is entitled to communicate directly with the public for the public to reach its own conclusion’. Moreover, it has been accepted that in some cases, disclosure in the press may be appropriate in order to communicate the relevant information where there are large numbers of entitled recipients: *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] 1 QB 103, para 55.

³⁵ [2011] EWHC 2454, para 65. The most high profile example of this is *Campbell v MGN* [2004] 2 AC 457.

earlier false image projected by the individual. Thus, where a defendant seeks to rely on the public interest in the information by virtue of correcting a false image, the defendant must demonstrate the probity of the information. This can be contrasted with the normal position, as outlined by Mr Justice Nicol:

Generally in a claim for publication of private information the Court is not concerned with whether the information is true or false. A Claimant is not, for instance, expected to admit the truth of what has been published as the price of obtaining redress.³⁶

Thus, several factors will come into play when placing an intense focus on the specific facts of the case: what is the alleged contribution to the public debate; was the conduct criminal; does the information correct a false image?

The Final Outcome

When these factors were taken into account by the court, Mr Justice Nicol concluded that the balance favoured expression, rather than privacy. Ferdinand's claim was therefore rejected: the information disclosed was private information in terms of article 8, but the right to freedom of expression outweighed the privacy considerations.

The main reason for this was Ferdinand's prior conduct. The disclosure was justified in the public interest, in order to "set the record straight" and correct the false image which Ferdinand had built up:

Through that article [in the News of the World in 2006] he projected an image of himself and, while that image persisted, there was a public interest in demonstrating (if it were to be the case) that the image was false.³⁷

This image of a reformed character projected in the News of the World was compounded in other interviews given by Ferdinand and in his autobiography.

A further contributing factor was Ferdinand's appointment as captain of the England football team – a role which carried with it "an expectation of high standards... off, as well as on, the pitch."³⁸ While not being required to decide whether Ferdinand was fit for the role as captain, Mr Justice Nicol nevertheless concluded that the information published by the Sunday Mirror contributed to that debate in public.

Whereas in *Campbell*, the House of Lords held that the newspaper was entitled to publish the information but not the photographic evidence, which was an added degree of intrusion and contributed nothing to the overall story, in this case the court reached a different conclusion. Although Ferdinand had a reasonable expectation that the image of him and Ms Storey from 1997 would remain private, its publication added to the overall story, by corroborating the existence and length of their relationship. Further, the nature of the image was "unexceptionable", as it did not show any particularly private or intimate moment (in contrast to the *Campbell* images).³⁹ It therefore failed to tip the balance in favour of the privacy right.

Whose right to freedom of expression: The Sunday Mirror's or Ms Storey's?

³⁶ [2011] EWHC 2454, para 67, with reference to *McKennitt v Ash* [2008] QB 73 (CA).

³⁷ [2011] EWHC 2454, para 85.

³⁸ [2011] EWHC 2454, para 89.

³⁹ [2011] EWHC 2454, para 102.

One issue which was not determinative, but which raises some interesting issues, is the question who has the right of expression: the Sunday Mirror or the other party to the activity? This was a pertinent point in *McKennitt v Ash*, and was also raised here. Although Mr Justice Nicol did not resolve the issue, the arguments put forward by the Claimant are persuasive but arguably not compelling. As summarised by the judge, the argument on behalf of the Claimant was that Ms Storey's rights were entitled to little weight, because:

While the article had given her account of the relationship with the Claimant, it has been published and would be read because of what it said about the Claimant. It was his story rather than hers.⁴⁰

This is certainly true. However, the information contributed to a public debate concerning the Claimant, and was therefore of value, regardless of the source. Moreover, the European Convention on Human Rights does not grade the rights it grants: *everyone* is entitled to freedom of expression. There is no qualification that the right to freedom expression can only be enjoyed by someone who is already in the public eye and therefore commands attention. The same holds, in reverse, for privacy: we do not accept that only private individuals have a right to privacy. Nonetheless, it does produce an uneasy tension when the private individual is seen to “cash in” on the fame or notoriety of the public individual and, in cases such as *McKennitt v Ash*, the privacy of the claimant was correctly respected.

Concluding Comments

In addition to consolidating the jurisprudence on privacy, and illustrating how far the law has evolved in just over 10 years, there are a number of further concluding points that can be made in relation to this case.

The first is to note, with disappointment, that there was no mention whatsoever of any data protection issue. There now appears to be a fairly consistent approach in privacy cases that data protection considerations are side-lined, and treated either as an “insurance policy” in case the privacy action fails or as an unnecessary extra where the privacy action succeeds.⁴¹ This has arguably resulted in data protection not even being raised by the claimant. While the claim would no doubt have been met with the “special purposes” defence provided in section 32 of the Data Protection Act 1998 for journalistic use, it is nevertheless disappointing that the rights and remedies granted in the Act are not being fully discussed and applied judicially.⁴²

The second area is the issue of whether Ferdinand's previous disclosures affected his right to privacy on this occasion. It undoubtedly makes sense that one does not undermine one's right to privacy on all issues simply by putting certain information in the public domain. However, there is a sense of unease in the idea that one person can unilaterally choose where to draw the line between disclosure and privacy, and it is good to note that the courts have demonstrated they can deal with this point appropriately in each case. In some cases, such as *McKennitt v Ash*, previous disclosure of certain information may still render further personal details private. Equally, however, as demonstrated in this case and in *Campbell*, it is necessary to

⁴⁰ [2011] EWHC 2454, para 81.

⁴¹ Re the former, see Mr Justice Eady in *Quinton v Peirce* [2009] EWHC 912 (QB), para 3; re the latter, see Baroness Hale in *Campbell v Mirror Group News* [2004] UKHL 22, para 130.

⁴² See further Gillian Black, “Data Protection”, in the *Stair Memorial Encyclopaedia*, Reissue 2010, paras 410-416 on “the privacy problem”.

have a mechanism to enable false impressions to be corrected. Accordingly, it is submitted that prior disclosure, especially where selective, should continue to be one factor in a range of relevant issues which is considered at the stage of balancing the privacy and expression interests.

The final point to raise is in relation to open justice, and the increasing concern over the use of super- and anonymised injunctions.⁴³ While this action was not the subject of an anonymised injunction, parts of the judgment have been redacted. These parts primarily refer to certain evidence, which has not been disclosed. This prevents the reader from having access to the full facts on which the judgment was based. It is difficult to tell how significant the redaction has been. Paragraph 22 is redacted in full, but whether it was one line or one hundred is not indicated. Likewise, information in paragraphs 10, 14, 15, 16, 18, 23, 48, 52, 72, 73, 76, 86 96, and 100 was also redacted, primarily (as far as one can tell) in relation to details of the relationship between Ferdinand and Ms Storey, such as the content of text messages they exchanged. While these details may not have been critical to the case, they were presumably not entirely irrelevant, since the judge needed to refer to them in setting out his judgment. Lord Neuberger's report from 20 May 2011 on *Super Injunctions, Anonymised Injunction and Open Justice*⁴⁴ addresses the difficulties of ensuring justice is done and is seen to be done, while protecting privacy interests. The report places open justice at the heart of the legal system, while recognising that in some cases protecting privacy is essential. It is suggested that partial redaction is preferable to the more extreme response of an anonymised injunction, although for the purposes of analysis and discussion the ideal outcome would always be to have access to the full report.

That said, today's news is tomorrow's fish and chip wrapper, and it is probable that Ferdinand's indiscretions (like Campbell's and Mosley's before him) will live on for much longer in the case reports and legal analyses than in the world of tabloid journalism.

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⁴³ Especially that expressed by the media throughout May and June 2011.

⁴⁴ Available at www.judiciary.gov.uk